

September 6, 2005

Douglas H. Calkins
Sr. Assistant City Attorney
Office of the City Attorney
City of San Bernardino
[Address Redacted]
San Bernardino, CA 92418-0001

**Re: Your Request for Advice
Our File No. A-05-164**

Dear Mr. Calkins:

This letter is in response to your request on behalf of Councilman Neil Derry for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹

QUESTION

May Councilmember Derry participate in decisions involving the planned formation and financing of the Underground Utility District ("District"), which would require his employer, Southern California Edison ("SCE"), to relocate above-ground facilities that it owns?

CONCLUSION

No. It is presumed that the governmental decision will have a reasonably foreseeable material financial effect on the council member's employer. Therefore, unless this presumption is rebutted, Councilmember Derry is disqualified from participating in decisions regarding the District.

FACTS

Councilman Derry was sworn in to the San Bernardino City Council on March 4, 2002. As of October 22, 2002, he was hired by, and continues to be an employee of Southern California Edison, a subsidiary of Edison International ("SCE"). His position is

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

Regional Manager Public Affairs. In this capacity he represents SCE interests in the cities of Upland, Ontario and Rancho Cucamonga.

On August 1, 2005, the city council had considered an agenda item requesting city council to set a public hearing for the consideration of forming an Underground Utility District in Councilman Derry's ward. The agenda item was continued pending the resolution of the potential conflict of interest by Councilman Derry.

An "underground utility district" is an area in the "...city within which poles, overhead wires, and associated overhead structures are prohibited" (San Bernardino Municipal Code, Section 13.36.010, sub. D.) If approved by the city council, the action would require the owner of any poles, overhead wires and overhead structures to remove the existing facilities and relocate and place them underground. SCE owns and maintains facilities located in the area of the project and would thus be required to remove and place the facilities underground in the district.

A portion of the funding for the project will be derived from California Public Utilities Commission ("CPUC") Rule 20A funds. Under Rule 20A, underground projects are paid for by all SCE ratepayers, not just those who live in locations where facilities will be placed under ground. City governments choose these projects, using a process that includes public participation. Using CPUC formulas, SCE allocates rate funds to communities for undergrounding based on previous allocations, the ratio of customers served by overhead facilities to all the customers in the community and the fraction that customers in the community represent of all SCE customers.

Approximately \$700,000 a year is allocated to the city by SCE through Rule 20A. Although the city has utilized its annual allocation of Rule 20A funds, SCE permits cities, including the City of San Bernardino, to "mortgage" future projects for up to five years. The project will be funded by "mortgaged" funds in the amount of approximately \$700,000. The total cost of the project is approximately \$1,000,000. The difference of approximately \$300,000 represents costs to the city of moving other utility poles and lines owned by other utility providers that are not covered by Rule 20A.

The corporate profile of SCE describes it as "... one of the nation's largest investor owned electric utilities, serving more than 13 million people in a 50,000 square-mile area of central, coastal and southern California excluding the City of Los Angeles and certain other cities. Based in Rosemead, California, the utility has been providing electric service in the region for 119 years. This SCE service territory includes approximately 430 cities and communities. As of March 31, 2005, SCE has consolidated assets of approximately \$23.9 billion."

Councilman Derry does not own any real property, nor any interest therein, located within 500 feet of the project. His duties as Regional Manager for Public Affairs for Upland, Ontario and Rancho Cucamonga do not involve managerial duties relate to the subject matter of this opinion. He owns no stock or other form of investment in SCE.

Councilman Derry had not initiated the proceeding by filing an application, claim, appeal, or similar request, nor does the action upon the request to form an underground utility district involve the issuance, renewal, approval, denial or revocation of any license.

ANALYSIS

1 & 2: Is Councilmember Derry a “public official” and will he be making, participating in making, or influencing a governmental decision?

The conflict of interest provisions of the Act pertain only to public officials. A public official includes “every member, officer, employee or consultant of a state or local government agency” (Section 82048; regulation 18701(a)(1).) As an elected member of the city council, Councilmember Derry is a public official subject to the Act’s conflict of interest provisions.

A public official “makes a governmental decision” when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (See regulation 18702.1.)

Councilmember Derry will “make a governmental decision” if he votes on any issue obligating the city with respect to the planned formation of an Underground Utility District (“District”). In addition to actually voting on these matters, if he engages in negotiations without significant substantive review, provides advice or makes recommendations, he will be “participating” in a decision (regulation 18702.2). He will also be “influencing” that decision if he appears before or otherwise attempts to influence any member, officer, employee or consultant of the agency.² (Regulation 18702.3.)

3. What are Councilmember Derry’s economic interests?

Section 87103 provides that a public official has a “financial interest” in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any of the official’s economic interests, described as follows:

² If a public official is enumerated in section 87200 (including city council members) and he or she has a conflict of interest in a decision noticed at a public meeting, then he or she must: (1) immediately prior to the discussion of the item, orally identify each type of economic interest involved in the decision as well as details of the economic interest, as discussed in regulation 18702.5, subdivision (b)(1)(B), on the record of the meeting; (2) recuse himself or herself; and (3) leave the room for the duration of the discussion and/or vote on the item. For closed sessions, consent calendars, absences and speaking as a member of the public regarding personal interests, special rules found in regulation 18702.5, subdivisions (c) and (d) apply. (§ 87105). Since a city council member is a position enumerated in Section 87200, these requirements apply to Mr. Derry.

- An economic interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more (Section 87103(a); Regulation 18703.1(a)); or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management (Section 87103(d); Regulation 18703.1(b));
- An economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more (Section 87103(b); Regulation 18703.2);
- An economic interest in any source of income, including promised income, which aggregates to \$500 or more within 12 months prior to the decision (Section 87103(c); Regulation 18703.3);
- An economic interest in any source of gifts to him or her if the gifts aggregate to \$360 or more within 12 months prior to the decision (Section 87103(e); Regulation 18703.4);

In addition, a public official always has an economic interest in his or her personal finances, including those of his or her immediate family -- this is the “personal financial effects” rule (Section 87103; Regulation 18703.5).

Southern California Edison—Source of Income, Business Entity:

Your facts involve two of the types of economic interests above. Our analysis will consider Councilmember Derry’s income and from, and his business position at SCE, where he works as the Regional Manager of Public Affairs. Thus, Councilmember Derry has an economic interest in SCE due to his management position in the company, and as a source of income, assuming he has received income aggregating \$500 or more within 12 months prior to the governmental decision.³

4. Is Councilmember Derry’s economic interest directly or indirectly involved in the governmental decision?

A person, including business entities, sources of income, and sources of gifts, is directly involved in a decision before an official’s agency when that person, either directly or by an agent:

“(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

“(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official’s agency. A person is the subject of the proceeding if a decision involves the issuance,

³ In addition, a nexus may exist if Councilmember Derry receives income to achieve a goal or purpose which would be achieved, defeated, aided or hindered by the governmental decision. The nexus issue is discussed below.

renewal, approval, denial or revocation of any license, permit, or other entitlement to, or *contract* with, the subject person.” (Regulation 18704.1(a).)

The facts you provide indicate that SCE is a named party in or the subject of the proceedings involving the formation and financing of the District, which requires SCE to contribute funds to (as mandated by the California Public Utilities Commission Rule 20A) and to relocate above-ground facilities that it owns. Under such facts, SCE would be directly involved in the decision.

5 & 6: Applying the materiality standards and determining the foreseeability of a material financial effect.

SCE/Directly Involved Business Entities:

If a business entity in which a public official has an economic interest is directly involved in a governmental decision, it is presumed that the financial effect of the governmental decision on the business entity is material. (Regulation 18705.1(b)(1).) This presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have any financial effect - even a penny’s worth - on the business entity.

Nexus Rule:

In addition, there is a separate and distinct materiality standard that applies in cases where there is a “nexus” between duties owed to a source of income and to the official’s public agency. The materiality threshold is understandably much lower when a public official is paid by a private person to accomplish some action that is within the official’s public decision-making authority. Under the nexus rule, “Any reasonably foreseeable financial effect on a person who is a source of income to a public official is deemed material if the public official receives or is promised the income to achieve a goal or purpose which would be achieved, defeated, aided, or hindered by the decision.” (Regulation 18705.3(c).)

The rationale for the nexus test is that when an employee earns a salary to accomplish a purpose that may be advanced by what he or she does as a public official, we presume that the employer is benefiting from the actions of the employee in his or her official capacity. (*Yarnell* Advice Letter, No. A-00-161.) Typically, a “nexus” is found in situations where the official is also a *high-level employee* with direct influence and control over his or her employer’s management or policy decisions. (*Moser* Advice Letter, No. A-03-147; *Low* Advice Letter, No. A-99-304.)

You stated that Councilmember Derry is SCE’s Regional Manager for Public Affairs and in this capacity represents SCE interests in the cities of Upland, Ontario and Rancho Cucamonga. You further state that the council member’s duties “do not involve managerial duties that in any way relate to the subject matter of this opinion.” However,

as public affairs director, Councilmember Derry's tasks may include promoting governmental action which would help to carry out SCE's mission. Thus, a nexus exists, and a material financial effect may occur, if a particular governmental decision that a high-level administrator like Councilmember Derry is asked to participate in would also achieve, defeat, aid or hinder a policy, purpose, or goal of SCE. (See *Moser*, supra; *Rankin* Advice Letter, No. A-94-310.) If a nexus results, any reasonably foreseeable financial effect on SCE of the decision to fund and create a District – even a penny's worth – is deemed material.

An effect upon economic interests is considered "reasonably foreseeable" if there is a substantial likelihood that it will occur. (Regulation 18706(a).) A financial effect need not be certain to be considered reasonably foreseeable, but it must be more than a mere possibility. (*In re Thorner* (1975) 1 FPPC Ops. 198.) Since the councilmember's employer is the subject of the decision, it is reasonably foreseeable that the decision will have some effect on SCE.

Therefore, unless this presumption is rebutted by a showing that the decision will have no financial effect on SCE, Councilmember Derry is disqualified from participating in decisions regarding the proposed formation of the Underground Utility District project in his ward.

7 & 8: The Public Generally and Legally Required Participation Exceptions.

An official who otherwise has a conflict of interest in a decision may still participate under the "public generally" exception. This exception applies when the financial effect of a decision on a public official's economic interests is substantially the same as the effect on a significant segment of the public.

The "legally required participation" rule applies when the official's participation in a governmental decision is legally required. (Section 87101; regulation 18708.)

You have not presented any facts indicating that these exceptions are applicable to your situation, therefore we do not address them here. If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca
General Counsel

By: Emelyn Rodriguez
Counsel, Legal Division

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